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No. 97-412

In The

Supreme Court of the United States

October Term, 1997

JOSEPH J. MATHY et al.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TAXATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

Whether the Supreme Court of Virginia decided a question of federal law or addressed a state law issue only when it decided that the petitioners were not entitled to a credit against Virginia individual income taxes for payments of the District of Columbia tax on unincorporated businesses?

Whether petitioners attempted to raise a new federal question in their Petition for Rehearing to the Supreme Court of Virginia, which was denied?

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STATEMENT OF THE CASE

The petitioners, Joseph J. Mathy and Sarah G. Mathy, challenge the interpretation and application of § 58.1-332 of the Code of Virginia of 1950, as amended (the Code). The Circuit Court for the City of Alexandria granted summary judgment to the Virginia Department of Taxation (the Department), ruling that the Mathys were not entitled to tax credits against their Virginia taxable income for the years 1991 through 1993 because the District of Columbia tax on unincorporated businesses, D.C. Code § 47-1808.1, (the DCUBT) in question was an unincorporated business tax, ineligible for the credit under § 58.1-332 of the Code. The Mathys appealed the decision of the lower court to the Supreme Court of Virginia, which granted an appeal on October 23, 1996. On April 18, 1997 the Supreme Court of Virginia affirmed the decision of the trial court but on different grounds, finding that the Mathys were not entitled to the Virginia credit against individual income taxes because the plain language of § 58.1-332(A), as applied to the DCUBT, denied the credit. The decision is reported at *Mathy v. Commonwealth*, 253 Va. 356, 483 S.E.2d 802 (1997). On May 15, 1997 the Mathys filed a Petition for Rehearing in the Supreme Court of Virginia, raising for the first time a new reason for finding that the credit should be allowed. By its Order dated June 6, 1997, the Supreme Court of Virginia denied the Petition for Rehearing and the petitioners subsequently filed their Petition for Writ of Certiorari with this Court.

The Department asserts that the petitioners have misinterpreted the decision of the Supreme Court of Virginia

in *Mathy* by phrasing their question presented and jurisdictional statements as if the Supreme Court of Virginia interpreted the DCUBT in isolation and purported to render a decision with respect to that statute which would have an impact in the District of Columbia. In fact, the Supreme Court of Virginia addressed a question of Virginia law involving the availability of a credit against individual income taxes for certain taxes paid by Virginia residents to other states. In interpreting the Virginia statute, the Supreme Court of Virginia had to evaluate the DCUBT and found that "the tax [the DCUBT] imposed on the Mathys is illegal and unauthorized under the Home Rule Act **for purposes of qualifying for a credit under Code § 58.1-332(A)** . . . " *Mathy*, 253 Va. at 362 (emphasis added).

In their Petition for Rehearing, petitioners attempted to challenge the finding of the Supreme Court of Virginia by raising for the first time the argument that the DCUBT was not imposed by the D.C. Council and therefore could not run afoul of the District of Columbia Home Rule Act.[1] This argument was not briefed by the Department or argued orally and was not considered by the Supreme Court of Virginia, which denied the Petition for Rehearing.

Under the rules and guidelines of this Court for the exercise of certiorari the petitioners must present an important federal question which should be decided by the Court. The petitioners have failed to establish any

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[1] Home Rule Act is the popular name for the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973).

federal question, better yet a substantial or important federal question. Similarly, the attempt by petitioners to create a federal question is based in part on a legal argument first raised in their Petition for Rehearing, which the Supreme Court of Virginia did not consider.

REASONS FOR DENYING THE WRIT

1. The Lack of a Substantial Federal Question.

The petitioners have attempted to craft a federal question by focusing solely on the DCUBT and not on the question presented to the Supreme Court of Virginia and answered by it. This case has always involved nothing more or less than an issue of state tax law. Virginia law[2] provides a credit against the individual income tax of Virginia residents for certain taxes paid to another state.

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[2] Section 58.1-332 of the Code of Virginia provides, in pertinent part, as follows:

A. Whenever a Virginia resident has become liable to another state for income tax on earned or business income . . . for the taxable year, derived from sources outside the Commonwealth and subject to taxation under this chapter, the amount of such tax payable by him shall . . . be credited on the taxpayer's return with the income tax so paid to the other state.

However, no franchise tax, license tax, excise, unincorporated business tax, occupation tax or any tax characterized as such by the taxing jurisdiction, although applied to earned or business income, shall qualify for a credit under this section, nor shall any tax which, if characterized as an income tax or a commuter tax, would be illegal and unauthorized under such other state's controlling or enabling legislation qualify for a credit under this section.

Va. Code § 58.1-332 (Repl. Vol. 1997).

Va. Code § 58.1-332 (Repl. Vol. 1997). There are, however, several limitations on the availability of the credit. The credit is not allowed for the payment of the types of taxes enumerated in the second paragraph of paragraph A of § 58.1-332. The exclusion which the Supreme Court of Virginia focused on in *Mathy* is that which denies a credit for taxes which, if characterized as an income tax or commuter tax, would be illegal and unauthorized under the controlling or enabling legislation of that state. *Id.*

The Supreme Court of Virginia noted that it was bound by principles of comity and prior precedent to find that the DCUBT is an income tax. *Mathy*, 253 Va. at 360 *citing Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979); *King v. Forst*, 239 Va. 557, 391 S.E.2d 60 (1990). In so finding, the Supreme Court of Virginia noted that the "Mathys are entitled to a credit under Code § 58.1-332(A) unless the tax 'would be illegal and unauthorized under such other state's controlling or enabling legislation.' . . . Therefore, . . . we must determine whether the UB tax would be illegal and unauthorized under the District of Columbia's Home Rule Act." *Mathy*, 253 Va. at 361. The only purpose for which the Supreme Court of Virginia addressed the DCUBT was to determine whether the petitioners were entitled to a tax credit under Virginia law.

In support of their contention that a substantial federal question is presented, the petitioners argue that the D.C. Council does not impose the DCUBT and therefore the proscription in the Home Rule Act that "the [District of Columbia] Council shall have no authority to . . . (5)

impose any tax on the whole or any portion of the personal income, either directly or indirectly or at the source thereof, of any individual not a resident of the District"[3] does not apply. At all stages of the litigation of this case prior to the Petition for Rehearing, the petitioners argued only that the DCUBT did not violate the Home Rule Act because it was not a tax on "personal income" although it is an income tax. The issue of the legality of the DCUBT was squarely before the trial court and the Supreme Court of Virginia and the petitioners did not present the argument that was first presented in the Petition for Rehearing.[4] Petitioners also renew their contention that the DCUBT is not a tax on "personal income", a determination which clearly does not present an important federal question worthy of a grant of certiorari by this Court.

2. The Failure to Present An Issue Involving the Full Faith and Credit Clause, Comity or the Supremacy Clause.

The petitioners make essentially unsupported assertions that this case presents issues involving the Full

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[3] Home Rule Act at § 602(a)(5).

[4] The Department disputes the validity of the argument made with respect to the application of the Home Rule Act, but does not reach the merits of that argument at this stage of the proceedings. The Department does note that the court in *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979), *aff'd en banc*, 411 A.2d 997 (1980), addressed the legislative activity of the D.C. Council in enacting the DCUBT.

Faith and Credit[5] and Supremacy[6] Clauses of the United States Constitution. The Petition provides no authority for its claim that the decision of the Supreme Court of Virginia in *Mathy* violated the Supremacy Clause of the Constitution. As discussed below, the Supremacy Clause is not implicated in this litigation. Similarly, the Petition asserts that the Supreme Court of Virginia in its decision was required to give full faith and credit and comity to the DCUBT in deciding the Virginia income tax issue before it and in support of those assertions refers the Court, without discussion, to *Fauntleroy v. Lum*, 210 U.S. 230 (1908) and *Elmendorf v. Taylor*, 10 Wheat. 152, 159-160 (1825). Neither of these cases support the proposition for which they are cited in the Petition.

Supremacy Clause

Under the Supremacy Clause, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the Constitution' are invalid." *Wisconsin Public Intervenors v. Mortier*, 501 U.S. 597, 604 (1991) *quoting Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824). The Supremacy Clause applies in instances of federal preemption, which is not involved in the current controversy. This Court has stated that "[s]tate law may run afoul of the Supremacy Clause in two distinct ways: the law may regulate the Government directly or discriminate against it . . . or it may conflict with an affirmative command of Congress." *North Dakota v. United States*, 495 U.S. 423, 434

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[5] Article IV, cl.1, U.S. Constitution.

[6] Article VI, cl. 2, U.S. Constitution.

(1990). Neither situation as discussed in *North Dakota* is present in *Mathy*.[7] The key to understanding the application of the Supremacy Clause is found in a decision by this Court, this year, in *Printz v. United States*, 521 U.S. ___, 117 S. Ct. 2365 (1997). In *Printz*, the Court recognized that the Supremacy Clause "makes 'Law of the Land' only 'Laws of the United States which shall be made in pursuance [of the Constitution]' " and does not extend to every act of Congress. *Id*. Nothing in the Petition suggests that any aspect of the DCUBT is in pursuance of the U.S. Constitution and accordingly the Supremacy Clause is not applicable in any circumstance.

Full Faith and Credit and Comity

The principle of comity and the concept of full faith and credit often are discussed in tandem, as is done in the Petition, without distinguishing between the two. Although not cited by the Petition, the concept of full faith and credit is based in Article IV, clause 1 of the U.S. Constitution, which provides that "[f]ull faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." The principle of comity, on the other hand, is often relied on in situations in which the full faith and credit clause does not apply but, out of courtesy and mutual interest, courts give recognition and effect to legislative, executive and judicial acts of another jurisdiction. *Eastern Indemnity Co.*

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[7] The Supremacy Clause argument presumably is founded in the petitioners' theory that the DCUBT is an act of Congress. Even assuming that premise is correct, the Supremacy Clause is not implicated in this matter for the reasons stated herein.

v. Hirschler Fleischer, 235 Va. 9, 366 S.E.2d 53 (1988); *Clark v. Clark*, 11 Va. App. 286, 398 S.E.2d 82 (1990).

The Supreme Court of Virginia adhered to the principle of comity in the *Mathy* decision, to the extent the principle was applicable. The Supreme Court of Virginia in a predecessor case to the pending matter specifically identified the principle of comity in its decision in finding it was "bound by the interpretation given by the highest court of a sister jurisdiction to the law of that jurisdiction." *King v. Forst*, 239 Va. 557, 560 (1990) *citing Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152 (1825). As noted in *King*, the decision in *Elmendorf* does not stand for the proposition that the Supreme Court of Virginia must "recognize and enforce the legislative acts of the District of Columbia" as asserted in the Petition. Petition at 17. Rather, *Elmendorf* states a "disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825). This is the principle applied by the Supreme Court of Virginia in *Mathy* in its finding that the DCUBT constitutes a tax on personal income. The court indicated that it was applying the principle of comity by applying the rule of *Bishop v. District of Columbia*, 401 A.2d 955 (D.C. 1979), *aff'd en banc*, 411 A.2d 997 (1980). The Supreme Court of Virginia held that it was bound by the finding of the court in *Bishop* that " '[t]he tax is levied upon personal income.' " *Mathy*, 253 Va. at 362, *quoting Bishop v. District of Columbia*, 401 A.2d at 961. The court in *Mathy* also found that the District of Columbia Court of Appeals also had determined that the DCUBT is a personal income tax

in *District of Columbia v. Califano*, 647 A.2d 761. 763 (D.C. 1994). *Mathy*, 253 Va. at 362.

The Supreme Court of Virginia was not presented with an issue of full faith and credit or comity in looking further at the DCUBT and determining that it is illegal and unauthorized under the Home Rule Act. The issue before the Supreme Court of Virginia was one of first impression, never having been considered by a court in the District. And further, the Supreme Court of Virginia was in the position only of interpreting the DCUBT for purposes of applying Virginia law. The full faith and credit clause was not intended to be "an unrestricted and inexorable mandate to be used to subordinate or set at naught one state's sovereign powers to those of another. . . . The policies of a state that involve its public acts, records, judicial proceedings, fundamental laws or like sovereign rights and interests do not fall within the spirit or intended purpose of the clause . . . " *Wallihan v. Hughes* 196 Va. 117, 129, 82 S.E.2d 553, 561 (1954). The court in *Mathy* was interpreting Virginia law and in so doing, of necessity, interpreted the DCUBT, addressing a question not previously addressed judicially. In fact, the Supreme Court of Virginia applied federal law, the Home Rule Act, to the DCUBT, in a case of first impression, in an attempt to reconcile the two statutes. In doing what it was charged to do, the court determined that the DCUBT was in conflict with the Home Rule Act.

The Supreme Court of Virginia was not purporting to enforce or not enforce the DCUBT; the court interpreted the D.C. statute in order to apply the Virginia statute in question. The petitioners encourage this Court to grant

their petition because of the potential impact of the decision of the Supreme Court of Virginia in the District of Columbia and claim error by the court in "failing to recognize the presumption of correctness of the assessment of the D.C. tax in question." Petition at 18. In fact, the decision of the Supreme Court of Virginia has no impact on the District of Columbia. The court was clear in its decision that its finding with respect to the DCUBT was "for the purposes of qualifying for a credit under [Virginia law]." *Mathy*, 253 Va. at 362.

The decision in *Fauntleroy v. Lum*, 210 U.S. 230 (1908), does not support the petitioners' contention in the Petition that the Supreme Court of Virginia was bound "to give full faith and credit and comity, not only to the judicial decisions of the District of Columbia, but also to the legislative acts of the District of Columbia." Petition at 16. *Fauntleroy* involved an action on a Missouri judgment brought in a Mississippi court. 210 U.S. at 233. The underlying claim for which the judgment was rendered involved futures trading which was illegal in Mississippi. Although the initial action could not have been brought in Mississippi, the plaintiff in *Fauntleroy* had a valid Missouri judgment which he could enforce in Mississippi. That represents the full extent of the decision in *Fauntleroy* and it has no application to the pending matter. The doctrine expressed in the case is that "the judgment of a state court should have the same credit, validity, and effect in every other court in the United States, which it had in the State where it was pronounced . . . " *Id.* at 236, *quoting Hampton v. McConnel*, 3 Wheat. 234 (1818).

The Petition, again without discussion, claims error in failing to presume the validity of the DCUBT and in

support of that position cites three decisions of the Supreme Court of Virginia which do not support their position. The cases cited, *Caldwell v. Seaboard System Railroad, Inc.*, 238 Va. 148, 380 S.E.2d 910 (1989), *City of Charlottesville v. DeHaan*, 228 Va. 578, 323 S.E.2d 131 (1984), and *City Council of Emporia v. Newsome*, 226 Va. 518, 311 S.E.2d 761 (1984), were all cases decided by the Supreme Court of Virginia involving questions of Virginia law and the presumption referred to by petitioners is the presumption given acts of the Virginia General Assembly by the courts in Virginia. For example, the Supreme Court of Virginia in *Newsome* stated that [e]very law **enacted by the General Assembly** carries a strong presumption of validity." 226 Va. at 523 (emphasis added).

3. The Failure to Establish Any Issue Involving the Equal Protection or Due Process Clauses of the U.S. Constitution.

In their attempt to craft some argument involving a federal question or the Constitution, the petitioners assert, again without support, that by denying the Virginia credit to the petitioners they are subjected to double taxation in violation of the equal protection clause and the due process clause of the U.S. Constitution. Petition at 19. As the petitioners did not provide any authority to support their assertion that the decision in *Mathy* violates the equal protection and due process clauses, it is impossible to analyze their theory. In an attempt to address the issue raised, however cursorily, the Department notes that the denial of the credit to petitioners is not discriminatory nor does it violate the equal protection clause.

There is no aspect of discrimination or arbitrariness in the interpretation or application of § 58.1-332 of the Virginia Code and petitioners do not point to any such discrimination or arbitrariness. The fact that a law makes classifications and may apply to a class only does not mean that it is a special law or that it is discriminatory. *Martin's Executors v. Commonwealth,* 126 Va. 603, 102 S.E. 77 (1920). A law will be valid as long as it applies equally to all persons within the class. *DiAntonio v. Northampton-Accomack Memorial Hospital,* 628 F.2d 287 (4th Cir. 1980).

Petitioners make no allegation that § 58.1-332 is not applied equally to all taxpayers subject to the enumerated taxes. Section 58.1-332 provides a credit to taxpayers in certain circumstances and all other credits are denied. Many taxpayers with income sourced outside Virginia are not granted a credit against Virginia income taxes, including those with unearned or nonbusiness income sourced outside Virginia. The General Assembly of Virginia has provided credits in certain instances in an act of legislative grace, none of which is mandated by any interpretation of constitutional law.

CONCLUSION

The Petition for Certiorari does not present any federal question, notwithstanding petitioners' efforts to create any number of federal and Constitutional arguments. The fact remains that the Supreme Court of Virginia in *Mathy* decided a question of Virginia law – the availability of a tax credit to the petitioners for taxes paid with respect to non-Virginia sourced income. The paucity of

support for the various arguments propounded by the petitioners provides perhaps the best analysis of the weakness of their arguments. The Petition fails to establish any issue sufficient to warrant a grant of the writ and, accordingly, the Department respectfully requests that the Petition be denied.

Respectfully submitted,

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